a) Saving Clause Exception.

Preemption doctrines do not take supremacy over express ERISA saving clause provisions, insurance, securities and banking laws are constitutionally reserved to state authority. Respondent filed a Motion to Dismiss Petitioner's bad faith claim based on preemption, raising no constitutional challenge to the statute. Absent a constitutional conflict of law, federal courts have pendent jurisdiction.

Petitioner's record pleadings and motions allege facts to support exercise of pendent federal and state jurisdiction. Medical coverage claims are often heard in federal court, at the court's discretion.

Pendent jurisdiction to hear a state insurance claim with an ERISA claim cannot be discretionary where an insurer funds its operation by accepting medical reimbursement subsidy from the state. The undisputed Complaint allegation that Respondent requested and accepted full state reimbursement for medical services paid by Petitioner appear to ground jurisdiction as pendent, not in conflict with ERISA.

b) Preemption inequitable to 'plan' participants.

The lower courts preempted Petitioner's bad faith claim based on Respondents' unsupported assertion that its decisions were made pursuant to an employer '*plan*'; a Fourteenth Amendment violation of the insurance statute and ERISA saving clause.

It was an inequitable exercise of jurisdiction, as courts do not preempt bad faith claimants that are not participants of an employer plan. Unconstitutional preemption of Petitioner's bad faith claim was also contrary to public policy.

It would be inequitable public policy for states to pay hospital reimbursement on publicly funded hospital claims using the medical necessity standard; concurrent with paying hospital reimbursement on *plan* participant claims using a policy language standard evaluating the same medical evidence.

Petitioner co-paid medical insurance premiums at rates established by Respondent and was denied coverage. Petitioner then paid for surgery months removed from approved pre-op treatments, that were intended to improve healing. Respondents' willful delay and inaction unnecessarily compounded Petitioner's pain and difficulty with dentures.

Respondent did not dispute or address Petitioner's allegation that it accepted reimbursement for surgery paid by Petitioner, a breach of legal duty and a violation of public policy that merits an exercise of this Court's supervisory power.

c) Inequitable exercise of appellate jurisdiction.

This appeal court chose not to grant an uncontested request for interlocutory appeal; an inequitable exercise of jurisdiction, where a panel of the same appeal court permitted interlocutory appeal to decide the Barber (2004) bad faith claim on the same statute. The lower courts erred in the standard of review it applied. Petitioner, a protected person under ERISA and this statute regulating insurance, should have had his claim construed *strict scrutiny* and *pari materia* with ERISA.

If upheld, preemption, as applied here, opens the door to insurers who deny medical coverage based on exclusionary policy language even when it is contrary to medical advice of treating physicians, an unconscionable departure from case precedent. Id.

d) Conflicts in the Pleadings

The court statement adopting Respondents' bald assertion , Appendix I, Transcript, 9a,that Respondent has ERISA standing is contradicted by pleading Answers, in Appendix III, 17. See paragraph 5, where Respondent relies on a contract, it did not attach. In paragraph 6, Respondent denies it is an ERISA insurer, it denies ERISA statutory language in other paragraphs and it filed Removal without attaching any plan documents. Appendix III, 53.

Respondent Highmark came sabre rattling to state court with an undocumented, bald assertion that it had standing to intervene and recover $250,000 hospital expenses paid through a proferred 'plan' and withdrew its appeal when it came time to produce evidence of ERISA standing. McGreevy v. Taylor Services, *et al*, GD 04-018842, Allegheny County Court of Common Pleas, Pennsylvania.

II. The lower courts failed to enforce the parties' statutory rights and duties, in violation of the Fourteenth Amendment.

Petitioner requests a *Writ of Certiorari* from appeal court orders preempting and dismissing the bad faith insurance claim prior to the close of pleadings.

a) Fiduciary Standard of Review

Respondents expressly reserve discretionary authority to determine eligibility for benefits and to construe plan terms. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 102 (1989), which warrants an arbitrary and capricious standard of review. Id.at 111. Respondent both funds and administers benefits, a conflict that warrants a heightened form of *arbitrary and capricious* standard of review. Pinto v. Reliance, 214 F.3d 377, 378 (3d Cir. 2000).

Respondents failure to investigate, litigate or settle this January 2004 claim, is inconsistent with an exercise of discretion by a fiduciary acting free of the interests that conflict with those of beneficiaries. Pinto, 214 F.3d at 391, evidence of bad faith. Factors used to decide severity of conflict:1) sophistication of the parties; 2) information accessible to the parties; 3) financial arrangements; 4) status of the fiduciary. Id.

Petitioner is employed in the factory position held by her husband prior to his disability and reports no corporate interests under the disclosure rules.

District court failed to implement F.R.P. 26 and corporate disclosure. The following information about Respondent was reported in local news media or produced by Respondent in actions in state court:

a) Respondents own medical lines of business trading under various names;
b) Respondents enter affiliate contracts giving rise to fiduciary conflict;
c) Respondents' agent-compensated products are endorsed by associations;
d) Respondent Highmark filed no disclosure on its dental insurance subsidiary;
e) Respondent Highmark attempts to add Keystone Blue to the caption, without a motion or hearing. See Appendix III, 51;
f) Highmark insures 2.8 million in W.Pa., sixty percent of region's health insurance.

In 2004, Respondents reported:

a) Over two billion dollars in reserve;
b) Over three hundred million dollars profit;
c) Paid its chief executive 1.7 million dollars;
d) Paid ten top executives 10 million dollars;
e) Its wholly owned dental subsidiary earned over one billion dollars in 2004 revenue.

Respondents' policy language denial of this dental surgery claim was contrary to the medical evidence, which Respondent acknowledged receiving from Petitioner's treating physician. Respondents' decision to deny coverage for Petitioner's dental surgery constituted an ordinary person understanding of 'bad faith' and possible self-dealing. An untenable precedent, as Respondent's dominant position in the region's health care market is used to define contract terms with employers and premium rates for insureds.

b) The courts failed to enforce rules of procedure.

The lower courts failed to enforce basic rules of civil procedure, a breach of duty under the codes of professional and judicial conduct. Judicial exercise of authority consistently failed to construe the law in favor of Petitioners.

Respondent Highmark's untimely Answer and failure to respond to material bad faith and ERISA allegations were not construed in favor of Petitioner.

The court issued an order then expanded time frames in favor of Respondents, see Appendix II, 39. It entered *sua sponte* rulings adverse to Petitioner on uncontested requests to appeal and amend. Refusing to permit amendment at this stage has no legal basis whatsoever. It was an abuse of discretion for the appeal court to *sua sponte* consolidate the appeals at 05-1717 and 05-2527 and dismiss them without incorporating some reference to Petitioner's statutory, procedural and constitutional rights. It was capricious disregard of Petitioner's rights for the appeal court to issue an order for statements of appellate jurisdiction and then waive jurisdiction inequitably with its panel in Barber, on the same statute.

c) Lower Courts Incorrectly Applied the Law.

"In the procedural context of a Motion to Dismiss, we accept the factual allegations contained in the Amendment Complaint as true and plaintiff receives the benefit of all reasonable inferences to be drawn therefrom. *See* Angelastro v. Prudential-Bache, 764 F.2d 939, 944 (3d Cir.), cert. denied, 474 U.S. 935, (1985). We may not affirm the dismissal of the complaint unless plaintiffs can prove no set of facts that would entitle them to relief. City of Philadelphia v. Lead Industries Assn., Inc., Nos. 92-1419, 92-1420, 92-1463, (3d Cir. 1993), *citing* Conley v. Gibson, 355 U.S. 41, 45-46, (1957). Respondents filed no denials of material complaint allegations.

"Procedural due process rules are meant to protect persons not from deprivation, but from mistaken or unjustified deprivation of life, liberty or property." U.S.C.A. Const. Amend. 14. Carey v. Piphus, 435 U.S. 247 (1978) *citing* Boddie v. Connecticut, 401 U.S. 371, 375 (1971). "The right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable without proof of actual injury." Id. Defendants elected not to litigate Plaintiff's bad faith claim in federal court, creating an undue economic prejudice to Plaintiff. This court has jurisdiction to review constitutional and legal errors.

Appellant reasonably believes the appeal court erred in relying on Quakenbush v. Allstate, 517 U. S. 707, 712 (1996), as the holding was limited to actions seeking common-law damages that are in federal court by way of diversity jurisdiction. Coles, et al v. Street, 38 Fed. Appx. 829 (3rd Cir. 2002).

d) The court abridged Petitioner's right to Amend.

Under the Fourteenth Amendment, due process mandates that once a state has created rights or benefits, these benefits may not be stripped away without due process of law. Fuentes v. Shevin, 407 U.S. 67, 81 (1972). Plaintiff has a statutory right to be heard on the 'bad faith' claim. Without an opportunity to be heard, Defendants are unjustly enriched at Plaintiffs expense.

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment-to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. Id.

Respondents' failure to fully investigate, litigate or resolve this claim is evidence of statutory bad faith.

f) Incorrect Application of Judicial Recusal

Constructive Notice of Department of Labor regulations concerning qualified plan procedures and medical care claims must be imputed to Respondents. Aetna Health Inc. v. Davila, 539 U.S. 986, 124 S.Ct. 2488 (2004). Actual Notice of Petitioner's claim was made on Respondents' control group: by appeal and elected representative inquiry, correspondence from counsel and December 2004 lawsuit, to no avail. Petitioners reasonably believe statutory rights to due process were abridged by the district court, in *bias* or legal error, and filed a Motion for Recusal, and later an Appeal Court *Writ of Mandamus*, which were denied in error.

Respondents, noting the court's apparent *bias*, tapped into the court's pattern of *animus* by using inflammatory terms to describe Petitioner's counsel as 'brazen' and Petitioner as 'flouting' the law, in its Notice of Removal and Motion to Consolidate. See Appendix III, 53/57.

The appeal court stated there is no *estoppel* and waived appellate jurisdiction, See Appendix I, 13, a conundrum for the parties and confounding to the understanding and common sense of ordinary people.

The courts here gave no explanation for the denials, further prejudice to Petitioner and contrary to this appeal court's precedential decision in Selkridge, where the court held that there was basis for judicial recusal, then addressed the merits of the case to find no prejudice based on failure to timely Amend. Selkridge v. United of Omaha Life Insurance Company, on appeal from the District Court of the Virgin Islands, 01-cv-00143, (3d Cir. 2004).

An award may be vacated where it is shown that there was fraud, partiality, or other misconduct or where it violates a specific command of some law, or, where the award is inconsistent with public policy." W.D. 78 cv 791 H, Judge Diamond *citing* Black v. Cutter Laboratories, 43 Cal. 2d 788, 798, 278 P. 2d 905, 911 (1953).

III. Two panel prejudice to Petitioner

This appeal court prejudiced Petitioner when it assigned the Writ of Mandamus to a second panel of circuit judges while two appeals were pending before a first panel of circuit judges assigned to review the underlying action in the same circuit.

The lower courts issued no opinions or findings incorporating merits of Petitioner's claims and appeals or procedural misfeasance of the district court in denying reasonable petitions to amend the complaint to include federal claims. Selkridge *supra.*

CONCLUSION

WHEREAS, lower courts failed to apply the correct standards of review; failed to enforce s..tutory rights and responsibilities of the parties; failed to correctly apply the law; and unconstitutionally preempted an insurance claim, inconsistent with public policy, in violation of 14th Amendment rights, Petitioner requests a *Writ of Certiorari* to review legal errors of imperative public importance.

Respectfully submitted,

11/15/05

Mary Ellen Chajkowski, Esquire
Counsel for Petitioners

(2) Supreme Court, U.S.
FILED

05-645 NOV 16 2005

No. 05-

OFFICE OF THE CLERK

In The

Supreme Court of the United States

DONNA SCHEIBLER, and
WILLLIAM SCHEIBLER, her husband,
Insured/Plaintiff,
Petitioner,

v.

HIGHMARK BLUE SHIELD,
Insurer, defendant,

THOMAS J. HARDIMAN,
United States District Court Judge,

Respondents.

On Petition for *Writ of Certiorari* to the
United States Court of Appeals for the Third Circuit

Appendix I – Court Orders and Transcripts

Mary Ellen Chajkowski, Esquire
Petitioner's Counsel of Record
Pennsylvania ID# 86611
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412-904-2222

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA
Civil Action No. 04-1928

DONNA SCHEIBLER and
WILLIAM SCHEIBLER, her husband,
Plaintiffs,

v.

HIGHMARK BLUE SHIELD,
Defendant.

ORDER ON MOTIONS PRACTICE

The parties shall submit to the following rules in making and responding to motions on any case assigned to this member of the Court:

1. A motion shall state the factual and legal grounds for said motion, and shall be accompanied by a brief in support. A brief in support shall not exceed twenty (20) pages in length. No briefs are required for discovery motions, motions for extension of time and motions for continuance.

2. Responses to non-dispositive motions shall be filed within (5) days, not to exceed five (5) pages. No reply briefs to non-dispositive motions are permitted without leave of Court. Responses to dispositive motions shall be filed within twenty (20) days. Responsive briefs are limited to ten (10) pages in length. Reply briefs are permitted in dispositive motions, and must be submitted within ten (10) days of service of the response and are not to exceed five (5) pages. Sur reply briefs are not to be filed without leave of Court and will be limited to five (5) pages, if leave is granted. No briefing schedule will issue.

3. Oral argument will not be scheduled unless the Court determines that it is necessary. An order will be issued should the Court deem oral argument necessary.

4. Courtesy copies of all motions and briefs shall be forwarded to chambers. Voluminous exhibit binders should be omitted as they are available from the file maintained by the Clerk of Court.

5. Counsel should be familiar with this Court's Practices and Procedures (see Court Practices and Procedures at www.pawd.uscourts.gov, link "court practice".)

SO ORDERED this 14th day of January, 2005

/s/ Thomas M. Hardiman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA
Civil Action No. 04-1928

DONNA SCHEIBLER and
WILLIAM SCHEIBLER, her husband,
Plaintiffs,

v.

HIGHMARK BLUE SHIELD,
Defendant.

ORDER

AND NOW, this 1st day of February, 2005, upon consideration of Defendant's Motion to Dismiss (Doc. No. 3), and Plaintiffs' opposition thereto, it is hereby ORDERED that said motion is GRANTED. Count II of Plaintiffs' Complaint (Pennsylvania Bad Faith Statute, 42 PA.C.S.A. § 8371) is DISMISSED WITH PREJUDICE.

/s/ Thomas M. Hardiman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA
Civil Action No. 04-1928

DONNA SCHEIBLER and
WILLIAM SCHEIBLER, her husband,
Plaintiffs,

v.

HIGHMARK BLUE SHIELD,
Defendant.

MEMORANDUM OPINION

I. Introduction

Plaintiffs Donna and William Scheibler bring this action claiming health care benefits under an employee benefits plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001, et seq. In Count II of their Complaint, Plaintiffs set forth a claim for bad faith denial of an insurance claim under the Pennsylvania bad faith statute, 42 Pa.C.S.A. § 8371. Pending before the Court is the Defendant Highmark Blue Shield's (Highmark) Motion to Dismiss Count II.

II. Standard of Review

In reviewing a motion to dismiss under Rule 12(b)(6), the court accepts all well-pleaded allegations as true and views them in the light most favorable to the plaintiff. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Id. (quoting

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). Claims should be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). However, a court will not accept unwarranted ingerences or sweeping legal conclusions cast in the form of factual allegations. Mitchell v. Cellone, No. 01-2028, 2003 U.S. Dist. LEXIS 22347, at *6 (W.D. Pa. November 17, 2003)(citing miree v. Dekalb County, Ga., 433 U.S. 25, 27 n.2 (1977)).

III. Summary of the Facts

Donna Scheibler is an employee of ABB, Inc. (ABB) and is enrolled as a beneficiary of ABB's health care benefits. Ms. Scheibler contends that her husband, William, is also entitled to benefits under the plain and that Highmark provided the health care insurance for the plan. Mr. Scheibler was diagnosed with cancer for which he underwent radiation treatment in 1997. Plaintiffs claim that Highmark approved pre- and post-operative hyperbaric oxygen treatment s to be performed in anticipation of William's oral surgery, but denied payment for the surgery itself. Plaintiffs claim that Highmark may have benefited by denying coverage for payment of hospital costs and later accepting reimbursement in excess of the agreed upon payment actually made. Plaintiffs seek to recover from Highmark damages that they allegedly suffered as a result of the denial of benefits. Plaintiffs appealed Highmark's denial of coverage, allegedly exhausting all administrative appeals. Count II of Plaintiffs' complaint purports to state a claim pursuant to the Pennsylvania bad faith statute, 42 Pa.C.S.A. § 8371.

IV. Discussion

The Court of Appeals for the Third Circuit recently held, in Barber v. Unum Life Ins. Co. of America, 383 F.3d 134 (3d Cir. 2004), that sections 502(a) and 514(a) of the Employee Retirement Income Security Act (ERISA) preempt claims under the Pennsylvania bad faith statute under both express preemption and conflict preemption. The Barber Court explained that conflict preemption applies to a state statute "if it provides 'a form of ultimate relief in a judicial forum that added to the judicial remedies provided by ERISA . . . or . . . if it 'duplicates, supplements, or supplants the ERISA civil enforcement remedy'." Id. at 140. The Court of Appeals found that the Pennsylvania bad faith statute provided such relief and that it was therefore subject to conflict preemption. Id. at 140-41. In the alternative, the Third Circuit found that claims under the Pennsylvania bad faith statute are expressly preempted by Section 514(a) of ERISA. Id. at 141-44.

As a result, Plaintiffs' bad faith claim in Count II is plainly barred under controlling law and must be dismissed.

An appropriate order follows.

/s/ Thomas M. Hardiman
United States District Judge
February 1, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA
Civil Action No. 04-1928

DONNA SCHEIBLER and
WILLIAM SCHEIBLER, her husband,
Plaintiffs,

v.

HIGHMARK BLUE SHIELD,
Defendant.

ORDER

AND NOW, this 14th day of February, 2005, Plaintiffs having filed in the above-entitled case a Petition for Reconsideration, it is hereby ORDERED that Defendant file a response to the motion on or before February 24, 2005.

BY THE COURT:

/s/ Thomas M. Hardiman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA
Civil Action No. 04-1928

DONNA SCHEIBLER and
WILLIAM SCHEIBLER, her husband,
Plaintiffs,

v.

HIGHMARK BLUE SHIELD,
Defendant.

ORDER

AND NOW, this 11th day of March, 2005, for the reasons stated on the record [03/10/05 Transcript], Count II of Plaintiffs' Complaint is dismissed with prejudice, Petition for Reconsideration is DENIED.

BY THE COURT:

Thomas M. Hardiman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA
Civil Action No. 04-1928

DONNA SCHEIBLER and
WILLIAM SCHEIBLER, her husband,
Plaintiffs,

v.

HIGHMARK BLUE SHIELD,
Defendant.

ORDER

AND NOW, this 13th day of April, 2005, it is hereby ORDERED that Plaintiffs' Petition for an Extension of Time to Amend the Complaint, docket no. 23, is DENIED.

BY THE COURT:

Thomas M. Hardiman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PA
Civil Action No. 04-1928

DONNA SCHEIBLER and
WILLIAM SCHEIBLER, her husband,
Plaintiffs,

v.

HIGHMARK BLUE SHIELD,
Defendant.

ORDER

ORDER

AND NOW, this 25th day of April, 2005, upon consideration of Plaintiffs' Petition for Reconsideration of the April 13, 2005 Court Order Denying Plaintiffs' Petition for an Extension of Time to Amend Complaint (Doc. No. 25), for the reasons stated on the record, it is hereby ORDERED that said Petition is DENIED.

BY THE COURT:

/s/ Thomas M. Hardiman
United States District Judge